REMARKS

Claims 1-6, 8-18, 20-26, and 28-32 are pending. Claims 7, 19, and 27 are canceled herewith, and independent claims 1, 13, and 21 are amended to include the subject matter of the canceled claims.

In an Official Action dated June 1, 2007, a provisional double patenting rejection was maintained, various previous rejections were withdrawn, and all claims were rejected under either 35 U.S.C. §§ 102 or 103. Applicants defer addressing the provisional double patenting rejection until one of the applications issues as a patent. The rejections under 35 U.S.C. §§ 102 or 103 are addressed below.

Rejection of Claims 1, 2, 4, 8-11, 21, 22, 24, and 28-31 Under 35 U.S.C. § 102

Claims 1, 2, 4, 8-11, 21, 22, 24, and 28-31 were rejected under 35 U.S.C. § 102 as allegedly anticipated by U.S. Pat. 6,070,191 (Narendran). Independent claims 1, 13, and 21 are amended to include an element which the Official Actions admits was not disclosed by Narendran. *See* Official Action page 8, item 17. Withdrawal of the outstanding rejections under 35 U.S.C. § 102 is therefore respectfully requested.

Rejection of Claims 3, 5-7, 12-20, 23, 25-27 and 32 Under 35 U.S.C. § 103

Remaining claims 3, 5-7, 12-20, 23, 25-27 and 32 were rejected under 35 U.S.C. § 103(a) as allegedly obvious over Narendran alone or over Narendran in view of Aversa. Claims 7, 19, and 27 are canceled and the subject matter thereof is incorporated into the independent claims.

The Official Action takes "Official Notice" on page 8, item 17 that "the concept and advantages of taking into account whether the server has extended memory or an inline adaptable cache into the load calculations of Aversa is well known in the art." The Official Action further alleges that "It would have been obvious to one of ordinary skill in the art to modify the teaching of Narendran-Aversa to include the use of extended memory or caching into the load calculations since Aversa lists numerous metrics which can be used to determine the load (i.e. open TCP connections, CPU utilization, etc.)(p.3, section 3.1). This would

motivate one of skill in the art to find more metrics which can be used to determine load, eventually finding the utilization of extended memory and caching."

Applicants request reconsideration of the above assertions. First, while the presence or absence of an extended memory or in-line adaptable cache may be a factor in a particular server's *capacity to handle load*, the presence of such features does not measure *existing load*, as do the metrics cited in Aversa. For example, the number of open TCP connections, CPU utilization, number of redirected TCP connections, and number of active sockets, are all hardware-independent measures of existing load. Therefore, it would not have been obvious to one of skill in the art to add extended memory or in-line adaptable cache to the metrics cited from Aversa.

Second, Applicants object to the use of "Official Notice" in items 14 and 17 of the Official Action. As stated in MPEP 2144.03:

> Official notice unsupported by documentary evidence should only be taken by the examiner where the facts asserted to be well-known, or to be common knowledge in the art are capable of instant and unquestionable demonstration as being well-known. As noted by the court in *In re Ahlert*, 424 F.2d 1088, 1091, 165 USPQ 418, 420 (CCPA 1970), the notice of facts beyond the record which may be taken by the examiner must be "capable of such instant and unquestionable demonstration as to defy dispute" (citing *In re Knapp Monarch Co.*, 296 F.2d 230, 132 USPQ 6 (CCPA 1961)).

Applicant's request evidence for the basis of such assertions, or allowance of Applicants claims if no prima facie case for obviousness can be supported by evidence. Furthermore, Applicants note that the statement on page 12, first paragraph of the Official Action regarding an applicant's duty to "seasonably challenge" is not supported by MPEP 2144.03 or In Re Chevenard. On the contrary, MPEP 2144.03 says that the Examiner must be readily able to prove assertions that are not supported by evidence, on demand, without mention of when such demand may be made. In Re Chevenard dealt with claims canceled after a restriction requirement, which is not the case here.

Applicants respectfully request withdrawal of the outstanding rejections and allowance of the application.

Date: July 9, 2007

Nathaniel Gilder
Registration No. 53,233

Woodcock Washburn LLP
Cira Centre
2929 Arch Street, 12th Floor
Philadelphia, PA 19104-2891
Telephone: (215) 568-3100
Facsimile: (215) 568-3439